IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO.....

MONROE J. STEWART,
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Monroe J. Stewart, respectfully prays for a writ of certiorari herein to review a certain final decision of the Circuit Court of Appeals of the Fifth Circuit in the above entitled action. The opinion and decision of said court having been rendered and filed on December 5, 1942, and a petition for rehearing which was, after being entertained and considered by said court, denied on January 16, 1943. The effect of which said decision by the Circuit Court of Appeals was to affirm a conviction of petitioner obtained by improper conduct of the District Attorney; and to affirm a conviction in violation of the rights guaranteed to petitioner by the Sixth Amendment to the Constitution of the United States.

QUESTIONS INVOLVED

1. Whether a conviction obtained by conduct of the District Attorney, which conduct has been characterized by the Supreme Court of the United States as highly improper, and which was pronounced and persistent, should be permitted to stand.

2. Whether an indictment charging a conspiracy to violate nine separate criminal statutes of the United States, a con-

spiracy to unlawfully do twenty separate and distinct acts, many of which are entirely unrelated, sufficiently informs the accused of the nature and cause of the accusation against him as is required by the Sixth Amendment to the Constitution of the United States.

3. Whether an indictment charging a conspiracy to violate the Internal Revenue Laws relating to alcoholic beverages, without pointing out which of said laws were to be violated by the conspiracy, and also charging in one and the same count a conspiracy to "unlawfully having knowledge of the actual commission of a felony cognizable by the courts of the United States, conceals and not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States;" which indictment could be sustained by proof of a conspiracy to unlawfully conceal the commission of counterfeiting or treason or any other felony, sufficiently informs the accused of the nature and cause of the accusation against him as is required by the Sixth Amendment to the Constitution of the United States.

4. Whether the form of the indictment, as a conspiracy indictment, completely destroys the guarantee of the Sixth Amendment to the Constitution, guaranteeing to the accused the right to be confronted with the witnesses against him, and destroys the hearsay rule to the extent of permitting a witness to testify to what he had heard an alleged co-conspirator say, which statements were not made in the presence of the accused and were not made for the purpose of perfecting the object of the conspiracy.

STATEMENT OF FACTS

In December Term 1941 the petitioner, Monroe J. Stewart, was indicted in the District Court for the Middle District of Alabama (R. pp. 2 to 11). The indictment charged a conspiracy

with three named co-defendants and fourteen named co-conspirators who were not indicted, and divers unknown persons, to commit divers offenses against the United States of America. These offenses were alleged to consist of violation of the Internal Revenue Laws of the United States relating to alcoholic beverages and of laws relating to extortion by informer and misprision of felony. The nature of the offenses to be committed was alleged by inserting every single alternative criminal law included in the Internal Revenue Laws relating to alcoholic beverages and every alternative of the statutes as to extortion by informer and misprision of felony. No attempt was made to allege a specific felony which the petitioner conspired to conceal (R. pp. 3, 4, and 5). Petitioner demurred to this indictment on the ground that it did not sufficiently inform him of the nature and cause of the action against him as was guaranteed to him by the Sixth Amendment to the Constitution of the United States (R. pp. 11 to 13), which demurrers were overruled (R. p. 59).

During the course of the trial the District Attorney and his assistant continually stated as facts things which were not in the evidence and not in the record. The District Attorney over continual objection of the petitioner insinuated he had knowledge of facts which were not before the jury. The Assistant District Attorney, when asked by the court whether he proposed to offer any testimony contrary to the petitioner's testimony as to good character (R. p. 329), stated: "We have got some but we won't use it." The Assistant District Attorney stated that he expected to show that one of petitioner's witnesses was engaged in the liquor business, insinuating thereby that he had knowledge of such fact, when it was not true and no effort was made to show that this witness had any connection with the liquor business. The Assistant District Attorney made assertions of personal knowledge as to what was and was not the truth (R. p. 229, R. p. 139). The Assistant District Attorney adopted an insulting attitude towards witnesses for the petitioner (R. pp. 214, 215, 217, 218, 219, 221, and 229.) The District Attorney in argument to the jury, over the objection of the peti-

tioner, stated that in his opinion the defendant beyond all reasonable doubt was guilty as charged (R. p. 305). The Assistant District Attorney further, during the trial of the case, before the jury, stated that it would be to the defendant's interest to make all possible cases against those who were not paying off, and the more cases they made the more people they could get to pay off (R. p. 254).

During the course of the trial the petitioner objected continually to attempts of the prosecution to introduce hearsay testimony. The District Court permitted all such hearsay testimony to go in if they were claimed to be statements by parties who were alleged as co-conspirators (R. pp. 61, 62, 65). This situation was such that the petitioner's counsel raised the question of whether the hearsay rule was completely discarded (R. p. 76). The District Court permitted, over the petitioner's objection, witnesses to testify what an alleged co-conspirator said the petitioner said (R. p. 109); to testify what an alleged co-conspirator said another alleged co-conspirator said (R. p. 84); to what the witness heard an alleged co-conspirator say he could do (R. p. 93, p. 146).

Severance was granted as to petitioner's brother, John D. Stewart. The affirmative charge was given for one of the co-defendants, Dan J. Stephens; the jury acquitted the other co-defendant, J. C. Lewis, but found petitioner guilty. He was sentenced to two years (R. pp. 15, 16). Appeal was duly taken to the Circuit Court of Appeals for the Fifth Circuit, which on December 5, 1942, rendered its decision affirming the judgment in the District Court. Petitioner promptly filed petition for rehearing, which was denied by the Circuit Court of Appeals on January 16. It is to correct this decision that the present proceedings are taken.

RULINGS OF THE COURT BELOW

The District Court wrote no opinion. It overruled the petitioner's demurrer (R. p. 59), thereby in effect holding that the indictment sufficiently apprized the petitioner of the nature

and cause of the accusation against him. It overruled petitioner's objections to the conduct of the District Attorney and his assistant, which objections in some instances were based on a claim that the defendant was entitled to a fair trial (R. pp. 305, 145, 107, 68, 76, 77). The District Court ruled in effect that any hearsay testimony as to statements by alleged co-conspirators were admissible, without regard to the presence or absence of the defendant, or whether such statements were made in furtherance of the conspiracy (R. pp. 61, 65, 76, 84, 93, 95, 109, 119, 169). The District Court overruled petitioner's motion to exclude such testimony, stating that it would be evidence as to whether there was a conspiracy or not (R. pp. 197 and 198).

The Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the court below. It rendered an opinion making no reference whatever to the assignments of error pointing out the improper conduct of the District Attorney. It sustained the action of the lower court in overruling the demurrers, stating:

> "An indictment is not duplicitous because it alleges a conspiracy to commit two or more distinct offenses of the same general character."

Thereby, in effect, the Circuit Court of Appeals held that the crime of unlawfully carrying on the business of a rectifier without having paid the special taxes required by law (R. p. 4) was an offense of the same general character as misprision of felony.

The Circuit Court of Appeals disposed of the objections to the hearsay testimony by saying:

> "In two instances the court admitted evidence over the objection of the appellant, but as no grounds were stated in support of the objections, we do not consider them."

It made no reference to the specific objections raising the question of hearsay testimony (R. pp. 61, 76, 77, and numerous other instances), or to the motion to exclude this testimony (R. pp. 197 and 198).

REASONS FOR GRANTING

The Circuit Court of Appeals for the Fifth Circuit decided a federal question in a way probably in conflict with applicable decisions of this Court in that the Circuit Court of Appeals affirms a judgment of conviction obtained by conduct of the District Attorney, which the Supreme Court of the United States in the case of *Williams v. United States,* 168 U. S. 382, 42 L. ed. 509, and *Berger v United States,* 295 U. S. 78, 79 L. ed. 1314, characterized as highly improper and reversible error.

The Circuit Court of Appeals for the Fifth Circuit decided an important question of federal law which has not been but should be settled by this Court, to-wit, whether an indictment for conspiracy to commit acts which would violate some nine statutes of the United States, three of which are entirely unrelated, sufficiently apprize the defendant of the nature and cause of the accusation against him in accordance with the guarantee of the Sixth Amendment to the Constitution of the United States.

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority and in conflict with the decisions of other circuits, in that the Circuit Court of Appeals decided that hearsay testimony as to conversations with alleged co-conspirators not on trial, made in the absence of the defendant on trial and not in furtherance of the object of the conspiracy, narrative relations of past events, were admissible in evidence, thereby defeating the right guaranteed to the petitioner under the Sixth Amendment to the Constitution of the United States to be confronted with the witnesses against him, said decision being in conflict with the decisions of *Clark v. United States,* 61 F. (2d) 409; *Whealton v. United States,* 113 F. (2d) 710; *Kuhn v. United States,* 26 F. (2d) 463; *United States v. Nardone,* 106 F. (2d) 41.

CONCLUSION

For these reasons it is respectfully submitted that this petition should be granted.

J. C. FLEMING,
JACK CRENSHAW,
Counsel for the Petitioner.